United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1253
76-1258

To be argued by
LAWRENCE IASON

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 76-1253, 76-1258

UNITED STATES OF AMERICA,
Appellee,

—v.—

FRED STEINBERG AND DENNIS RIESE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Fred Steinberg and Dennis Riese appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on May 21, 1976 following an eight-day jury trial before the Honorable Inzer B. Wyatt, United States District Judge.

Indictment 76 Cr. 128, filed on February 4, 1976, charged Steinberg and Riese in seven counts with conspiracy to pay bribes to officers of the Immigration and Naturalization Service and to defraud the United States and with having paid bribes and having aided and abetted others in the payment of bribes to officers of the Immigration and Naturalization Service in violation of Title 18, United States Code, Sections 2, 201(b) and 371.

Trial began on March 22, 1976, and concluded on March 31, 1976, when the jury found both defendants

guilty on all counts. On May 21, 1976, Judge Wyatt suspended the imposition of sentence and placed both defendants on probation for three years under the Youth Corrections Act, 18 U.S.C. § 5010(a), as extended by the Young Adult Offender Act, 18 U.S.C. § 4209.

Statement of Facts

The Government's Case

A. Synopsis

The evidence at trial showed that between March 19, 1975, and June 12, 1975, Steinberg and Riese actively and continuously sought to influence officers of the Immigration and Naturalization Service in order to prevent the arrest of aliens illegally working at Brew Burger Restaurants, a chain of inexpensive restaurants located in New York City, owned by Riese's family and operated by Steinberg and Riese. Steinberg and Riese arranged to have five of their employees pay $1000 bribes to the INS officers in exchange for Alien Registration Receipt Cards (green cards), so that the aliens would be able to work at the restaurants. In addition, the defendants sought to obtain advance information about an INS investigation of aliens working illegally at the restaurants, in order to prevent arrests of aliens who were key employees and to arrange for arrests of alien employees who were expendable or considered troublesome.

B. The Proof at Trial

1. The Early Encounters

On March 19, 1975, John Volpe, a criminal investigator with the Immigration and Naturalization Service, acting on a complaint received by the Service that the

restaurant was employing illegal aliens, went to a Brew Burger Restaurant located at Third Avenue and 59th Street in New York, accompanied by fellow INS employees. Volpe told the restaurant's manager of the complaint, and, with the manager's permission, both he and his fellow investigators began questioning the restaurant's employees. While the investigation was proceeding, defendant Steinberg approached Volpe, identifying himself as the night supervisor of all the Brew Burger Restaurants, and asked whether something could be "worked out." Steinberg also urged Volpe to arrest only half the number of illegal aliens found in the restaurant. When Volpe told Steinberg that the law required him to arrest everybody, Steinberg again asked whether they could work something out. Volpe's patient explanation to Steinberg that all the illegal aliens found in the restaurant would have to accompany Volpe to his office, where Volpe's superiors would decide whether they would be detained or released that night, was met with Steinberg's third corrupt intimation couched in terms of working something out. This time, however, Steinberg suggested that Volpe should tip Steinberg off whenever a Brew Burger was to be raided so that Steinberg could shift his employees, placing Americans in the restaurants to be visited by INS. During the course of their conversation that evening, presumably in order to impress Volpe, Steinberg boasted that he had paid-off members of the Lindsay Administration and members of the Police Department. (Tr. 89-95, 103 *).

Without committing himself one way or the other, Volpe arrested all the aliens. Once at the Service's of-

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* References to the trial transcript and to Government Exhibits are abbreviated as "Tr." and "GX." References to the appendix submitted by Riese are abbreviated as "RA" and references to exhibits of the defendant Riese are abbreviated as "DRX."

fices, however, Volpe reported Steinberg's corrupt offer to his supervisor, John E. Coffee.

The following day Volpe, Volpe's partner, Joel Moskowitz, and Coffee reported the incident to higher levels within the INS. Volpe's superiors instructed him to pursue the investigation. (Tr. 104-105).

As a consequence, on March 31, 1975, Volpe, Moskowitz and other INS officers went to another Brew Burger located at 34th Street and Seventh Avenue. Soon after the manager granted permission to investigate the employees, Steinberg appeared and repeated his familiar entreaty to work something out. Volpe was surprised by Steinberg's quick appearance on the scene, but Steinberg explained that he could park wherever he wanted because the Brew Burger organization had "bought" policemen and Lindsay Administration officials. (Tr. 106-108).

Additionally, Steinberg pleaded with Volpe not to arrest one of the illegal aliens because Steinberg said she was his "girlfriend.' Volpe acceded to this request by issuing her a "pass"—a direction to appear at INS offices without being arrested. (Tr. 109-113; GX 38).

When Volpe and Moskowitz told their superiors of Steinberg's suggestions, it was decided that the FBI should intervene. Thereafter, the FBI became aware of all contacts with Steinberg. (Tr. 117-120).*

The next contact occurred on April 29, 1975, when Volpe and Moskowitz were investigating yet another Brew Burger restaurant. (Tr. 117-122, 728-729). This time, however, Steinberg did not appear, but spoke with Volpe on the telephone. Steinberg urged Volpe not to go

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* At Coffee's instruction, Volpe wrote a memorandum about the March 31st incident. (Tr. 496-499, 509-510; DRX-A, RA 369a).

to another Brew Burger that evening, requesting that during the next such investigation, Volpe have the manager of the restaurant contact Steinberg immediately. (Tr. 117-22, 728-29).

2. The Corrupt Offer

Wearing a concealed recorder,* Volpe and Moskowitz appeared at a Brew Burger on May 6, 1975. Following Steinberg's request of April 29th, Volpe asked the manager to call Steinberg, who arrived approximately ten or fifteen minutes later. (Tr. 123-124, 729-733).

After a few minutes, defendant Dennis Riese joined Steinberg, Volpe and Moskowitz, and a lengthy conversation followed. A recording of this conversation was placed in evidence. At the outset, Steinberg referred to the problems Brew Burger had encountered as a result of the various INS investigations. Steinberg said that Brew Burger now required aliens to have green cards before they could be hired, but explained that aliens who did not have green cards could not be fired because of problems with the union. Steinberg referred to the INS investigations as "blitzes" and said:

> "[I]t was actually affecting our business, daytime and nighttime, we were short crew and there was no way that we could immediately rebuild our crews after that blitz, so that we were continuously had customer problems, we couldn't get good service, anything that we did replace, of course, were brand new trainees." (GX 1, GX 1A** p. 7, RA 270a)

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* At this meeting and all subsequent conversations with Steinberg except one, either Volpe or Moskowitz wore a concealed tape recorder or attached a tape recorder to the telephone.

** The transcripts of tape recordings introduced as Government Exhibits were designated by the letter "A" following the number corresponding to the exhibit number for the tape recording.

Recognizing that Brew Burgers were legitimate targets of INS inquires, Steinberg urged that the investigations occur less frequently. As if directing a stage play, Steinberg stated that he "would let [the INS] pull the whole store," to which Riese added, "if we knew that you were coming, there are certain people who we really don't mind losing out on." When Volpe mentioned that Steinberg previously had asked for advance notice of investigations, Riese said, "Then we could set it up for you to look good." Seizing on Steinberg's earlier entreaties, Volpe stated that he had come over to see whether they might "work something out". Steinberg said he had thought that at the beginning. As the conversation continued, Riese explained that the one type of employee he could not afford to lose was a manager, and Steinberg said he would tell the Immigration officers which employees they should arrest, stating that "I will always give you Mexican dishwashers." (GX 1, GX 1A pp. 8-10, 15, RA 271a-273a, 278a).

The conversation rambled on through dinner, but Steinberg brought it back on point, asking: "What would be the best way for us to do this? Walk into a store, call me and I come there?" Riese then asked the officers to call Steinberg by 4:00 o'clock in the afternoon so that Steinberg would have time to schedule replacements for employees who might be arrested. Steinberg, Riese, Volpe and Moskowitz then talked at length about various ways that Steinberg and Riese could take advantage of advance information from Volpe and Moskowitz without letting anyone else discover what was happening. (GX 1, GX 1A pp. 20-26), RA 283a-289a).

After Steinberg and Diese had laid this groundwork, Volpe attempted to get specific and explained the risks of "working something out," claiming that if he and Moskowitz lost their government jobs, they stood to lose a

$300,000 investment, and might even have to spend "a little time in the slammer." (GX 1, GX 1A p. 27, RA 290a).

Riese, on the other hand, not commenting on the risks to Volpe and Moskowitz, sought instead to delve into the extent of favors a corrupted INS officer could provide by asking whether the officers could obtain a green card for an obviously important manager who was from India and residing in the United States illegally. Later in the conversation, when Riese brought up the subject of the Indian manager again, Moskowitz gave Riese a pass for the alien, and Volpe said that since what we are doing is "going to be beneficial to you guys, they got to turn around and be beneficial to us, too, somehow, alright?" (GX 1, GX 1A pp. 29, 31, 43, 48, 50, RA 292a, 294a, 306a, 311-313a).

Satisfied that the officers could produce for the defendants, Steinberg and Riese turned the conversation into a negotiating session, first offering free dinners and tickets to sporting events. The officers responded that money was "the only way." Reluctant to commit their own money, but stating that he had "an awful lot at stake" and that he would love to figure out a way for the officers to receive it, Riese suggested that the aliens receiving the green cards could fund the bribes. (GX 1, GX 1A pp. 49, 51, 56, 58-60, RA 312a, 314a, 319a, 321a-323a).

No final agreement was reached at that meeting and, after some additional conversation, Riese said he wanted "to think about it . . . how to work it out and stuff like that," and Steinberg asked for a week "to think about it." As the conversation concluded, Steinberg told Volpe and Moskowitz to contact him in a week by going into any Brew Burger and asking the manager to call him. Riese added "just sit down and ask for Fred Steinberg" (GX 1, GX 1A pp. 64, 67, RA 327a, 330a).

Having rejected the idea of using corporate money to fund the bribes and unsure of whether the officers would agree to any other arrangement, Riese decided to warn his corporate superior, Eamonn Dolan, of potential Immigration problems in the restaurant. In a letter to Dolan dated May 7, 1975, Riese wrote:

> "I expect Brewburgers to be hit very hard by immigration officials beginning Tuesday, May 13. On that date, Fred Steinberg and I will meet for a second time, and we will be refusing a certain deal that they wish to make. I expect they will be angry at our refusal, and there will be reprisals." (GX 39, RA 394a).

As a result of this letter, Dolan, on May 10th, asked what kind of "deal" the Immigration officials were seeking. Riese said:

> "We seem to have a lot of these illegal aliens in our stores. We are having difficulty staffing them when they raid the stores and pull the people out.

When Riese told Dolan that the Immigration officers were looking for money, Dolan, in no uncertain terms, instructed Riese not to keep the appointment with the officers and told Riese to have no further contact with them. Dolan, to his credit, added that if the Immigration officers arrested everyone who was working illegally, that was the way it had to be and that the illegal aliens who were employed in the stores should be replaced as soon as possible. Riese, to his discredit, ignored these instructions. (Tr. 304, 307-309).

3. The Agreement

On May 14, 1975, Steinberg communicated the final rejection of the use of corporate money to Volpe and Moskowitz. Steinberg reasoned that if the employee who received the green card paid directly, the risks of exposure would be reduced because the employee would not "open

his mouth to anybody." Steinberg reported that he had asked some of his employees whether they would be interested in buying green cards for $1000 each and that everyone he asked had expressed interest. Steinberg added that he would ask for more than $1000 from employees who might be willing to pay more. Volpe responded that someone from the company would have to sign a labor certification form for each alien to make the papers in the alien's file appear to be legitimate. He suggested that Steinberg sign only some of the forms. Steinberg said both he and Riese would sign the forms. The agreement reached, Volpe warned that the INS would still have to arrest a few Brew Burger employees occasionally in order to avoid suspicion. Steinberg understood and said he would direct the officers "exactly where to go." (GX 2, GX 2A pp. 4-7, 9, 16, 22, 26, RA 333a-336a, 338a, 345a, 351a, 355a).

Volpe spoke to Steinberg on the telephone twice on May 21, 1975. In the first conversation, Volpe told Steinberg that Volpe's supervisor was putting pressure on him to conduct additional investigations at Brew Burger restaurants and that Steinberg should tell Volpe which restaurants should be visited. Later, when Volpe called back, Steinberg told him the locations of two restaurants he should visit the following day and said he would meet Volpe at one of them. Steinberg told Volpe to "clean out" these restaurants because the unions there were troublesome. (Tr. 194-196, GX 3, GX 3A, GX 4, GX 4A p. 4).

The next day, Volpe and Moskowitz met with Steinberg and Riese in front of the Brew Burger at 41st Street and Second Avenue. Steinberg said that since there was only one illegal alien at this restaurant, he and Riese would "give" Volpe and Moskowitz an additional restaurant. Riese said that he and Steinberg had been discussing the arrangement and they felt badly about setting up

their own employees. Riese said that in the future Volpe and Moskowitz should stay away from five restaurants listed on a piece of paper Steinberg handed to them, but that otherwise they could go wherever they wished. Riese, Steinberg and Volpe then discussed the sale of the green cards. At the end of this portion of the discussion, Riese, feigning ignorance, said he "didn't know anything about this," that Steinberg must "know what [Volpe's] talking about." Steinberg just laughed. (GX 6; GX 6A; pp. 1-2, 5, RA 360a-361a, 364a).

After they talked some more about the green cards and the arrests for that evening, Riese, seeking to take full advantage of his corrupt arrangement, told Steinberg to "tell them about Romano." Steinberg then told Volpe and Moskowitz that he and Riese wanted them to arrest the cook at another Brew Burger location because the cook had "pulled a slowdown." Steinberg said that if Volpe and Moskowitz could not arrest the cook, because he might have a green card, he, Steinberg, "really would appreciate it if you harassed him a little bit." When Volpe dispatched another INS officer to the restaurant where Romano worked, Steinberg, laughing, said "tell him to get a little rough with the cook". (GX 6, GX 6A, pp. 7-9, RA 366a-368a).

As the conversation returned to the sale of green cards, Riese personally felt compelled to explain the rejection of the use of corporate money, stating that "it was not our company." Volpe and Moskowitz said they were satisfied with the arrangements to sell green cards, and Riese said that the employees who were buying the cards were the ones "we want to make happy." Riese also said he wanted Volpe and Moskowitz to file reports showing that each time they went to a Brew Burger, they found fewer illegal aliens than they previously had found.

In that way, Riese said, Immigration eventually should forget about Brew Burgers. Riese left, and as Volpe and Moskowitz were driving Steinberg to his car, they told Steinberg they would give him a green card for his girlfriend at no charge. (GX 6, GX 6A, pp. 12, 16, 21-27, RA 371a, 375a, 379a-386a).

Volpe and Moskowitz next met with Steinberg on the afternoon of May 27, 1975 at another Brew Burger. Steinberg led Volpe and Moskowitz to the rear of the restaurant where they gave him the forms that were needed for the green cards and explained how they should be filled out. (Tr. 267-272, GX's 8, 8A).

4. The Bribes

Steinberg and Volpe talked on the telephone on June 3rd and June 5th and agreed to meet on June 9th so that Volpe could pick up the completed forms. (Tr. 276-277, 32-323, GX's 9, 9A, 10 and 10A).

At the June 9th meeting, Steinberg gave Volpe and Moskowitz the completed forms and said he would have the others soon. Steinberg told Volpe and Moskowitz to review these forms carefully in order to be sure that there were no problems, warning, "You guys are dealing with five grand here. There's gotta be some kind of risk involved and you've got to eliminate it." (GX 11, 11A, p. 10).

On June 10th Steinberg gave Volpe and Moskowitz the rest of the forms needed for the green cards. They agreed to meet on Thursday, June 12th at the Commodore Hotel to exchange the green cards for the money. Steinberg said he would tell each alien to come at a specified time, spaced fifteen minutes apart, so that no two people would see each other. (Tr. 337-340, GX's 12, 12A).

Meanwhile, following their meeting with Volpe and Moskowitz on May 6th, Steinberg and Riese had been talking with some of their employees about buying green card. One of these employees was Chayanon Vongchan, a Brew Burger employee who was born in Thailand. Knowing that Vongchan had an expired visa and had run away from Immigration officers, Riese told Chayanon's sister, Naree Vongchan, that Steinberg had a friend who was an Immigration officer and who would provide Vongchan with a green card in exchange for $1,000. Riese told Naree Vongchan that he, Riese, did not "want to get involved in this." Naree then told her brother about her conversation with Riese. A few days later Chayanon Vongchan came to the Brew Burger restaurant where his sister worked. Steinberg came in and Chayanon talked to Steinberg about getting a green card. Two or three days later Chayanon Vongchan met with Riese and Steinberg and related his problem with INS. Steinberg said he would help Vongchan. As Vongchan was leaving, Riese said: "Chay, you have nothing to do with me" (Tr. 819-824, 827-845).

Approximately a week later, Vongchan again met with Steinberg. At Steinberg's instruction, Vongchan filled out one of the forms Volpe and Moskowitz had given to Steinberg. A few days later, Steinberg gave Vongchan a piece of paper instructing Vongchan to bring $1,000 in small bills to the Commodore Hotel. As Vongchan was leaving, he talked briefly with Riese, who was sitting nearby. Riese told Vongchan that he was the only cook among the aliens Riese and Steinberg were "helping." * Riese also mentioned that he had signed a form for Vongchan. (Tr. 845-850, GX 34).

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* The others were restaurants managers. On May 6th Riese had said managers were the only employees he could not afford to lose. (GX 1, GX 1A, p. 10, R.A. 273a).

Riese and Steinberg also talked with Mohammed Ansari, Avinash Vashisht,* Phairoj Boonamnuaysuk and Giovanni Pirina and arranged for each of them to purchase a green card for $1,000. The arrangements were similar to those for Vongchan. Knowing that each of these men had problems with the Immigration and Naturalization Service, Riese and Steinberg spoke with them about purchasing a green card for $1,000 each. Steinberg later provided each of the aliens with a set of the forms Steinberg had received from Volpe and Moskowitz. After helping each of the men complete the forms, Steinberg returned the forms to Volpe and Moskowitz. Steinberg then instructed the men to bring $1,000 to the Commodore Hotel on June 12, 1975. (Tr. 869-892, 903-917, 920-936, 964-982, 986-1004).

On June 12, 1975, Steinberg and his girlfriend came to the Commodore Hotel where Volpe and Moskowitz gave Steinberg's girlfriend a green card. After that, the five aliens each arrived separately at the Commodore, gave Volpe and Moskowitz $1,000 and received a green card. They were each arrested on their way out. (Tr. 356-372, GX's 13, 13A).

The Defense Case

The defendants did not testify nor did they offer any evidence on their behalf.

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* During the May 6th meeting Moskowitz gave Riese a business card Vashisht could use as a "pass" so that INS officers would not arrest him. (GX1, GX1A, pp. 29, 43, 48-50; RA 292a, 306a, 311a-313a). Riese gave this pass to Vashisht. (Tr. 928).

ARGUMENT

POINT I

The Government agents acted properly in their conduct of this investigation, which began only after Steinberg sought to bribe Volpe and Moskowitz and which continued when Steinberg and Riese devised a scheme for their employees to pay bribes to the INS officers.

Both appellants contend that their convictions should be reversed and the indictment dismissed because of what they claim was improper conduct by the Government in its investigation. This argument, according to the appellants, is based on Due Process considerations that go beyond the defense of entrapment, which they raised exhaustively and unsuccessfully below. The appellants also argue, in the alternative, that their convictions should be reversed because the evidence establishes entrapment as a matter of law, in that the evidence shows inducement without proof of predisposition. Both contentions, based as they are on a distorted statement of the facts, are without merit and should be rejected.

The evidence, viewed, as it must be, in the light most favorable to the Government, *United States* v. *Goldberg*, 527 F.2d 165, 168 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3659 (May 18, 1976); *United States* v. *Leonard*, 524 F.2d 1076, 1081 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3624 (May 3, 1976); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), established that prior to the actual bribe payments, Steinberg repeatedly approached Immigration officers Volpe and Moskowitz and asked them suggestively whether "they could work something out." Steinberg made it clear that this was intended to divert Volpe and Moskowitz from the

proper enforcement of the Immigration laws. The evidence also established that Volpe and Moskowitz, their superiors at INS, the FBI and the United States Attorney's office conducted a careful and perfectly proper investigation to determine exactly what Steinberg's intentions were—an investigation which, contrary to appellants' suggestions, was mandated as a direct result of Steinberg's corrupt overtures.

This investigation began only after the Brew Burger investigation of March 19, 1975, during which Steinberg three times urged Volpe to "work something out." Steinberg made it clear that his intent was corrupt: he suggested the INS arrest only half the illegal employees found on the premises and said that he wanted Volpe to telephone him before going to a Brew Burger so that the employees could be shifted, placing Americans in the stores where INS would be conducting investigations.

This incident alone—showing Steinberg's clear predisposition to bribe—is sufficient to justify the investigation that followed and to put to rest Steinberg's claim that the Government agents entrapped him into committing the crimes charged.

The appellants' claims of overreaching by the Government are belied as well by the measured response of the Immigration and Naturalization Service to this attempt to corrupt its officers. The incident was reported along the INS chain of command, and Volpe simply was told to investigate further. Steinberg's further reference to working something out, in addition to his blunt braggadocio concerning the Lindsay Administration and the police during the meeting of March 31, was again reported along the INS chain of command. This time, however, the Immigration Service notified the Federal Bureau of Investigation. After meeting with an FBI agent, Volpe

and Moskowitz conducted the investigation of April 29th, during which Steinberg asked Volpe not to go to any other Brew Burger that evening.

After this meeting, the officers and the FBI agent met with an Assistant United States Attorney, who, after a briefing on the prior meetings, concluded that he would consider prosecution only if an actual bribe was paid and the payment was corroborated by a tape recorded conversation.

In light of this careful response, appellants' claim that the Government's conduct was "outrageous" falls woefully short of the mark. Indeed, had the Government *not* responded to the oft-repeated entreaties to "work something out" in the way that it did—had the officers not reported the incidents to their superiors, had they not sought the intervention of the FBI and the United States Attorney, then, and only then, would such a claim lie. However, the officers *did* report the entreaties, and the recorded conversation of May 6th provided the corroboration of both appellants' corrupt intent.

The appellants, not the officers, suggested the INS conduct fewer investigations of their restaurants; the appellants, not the officers, suggested that they determine which employees to arrest; the appellants, not the officers, brought up the subject of green cards for choice employees without going through channels; the appellants, not the officers, mentioned free meals and tickets to sporting events in return for these favors. By seizing upon appellants' reluctance to commit corporate money to this illicit venture, counsel cynically attempts to convert what was obviously a negotiating tactic to the height of alleged government "overreaching". Attempts to minimize the cost and risk of their stated desire for preferential governmental treatment is, however, no defense; concom-

itantly, the officers' staged intransigence to "selling out" too cheaply is not "overreaching" where, as here, the corruptors clearly and unmistakably showed their predisposition first and repeatedly. The arrangement for third-party funding of a bribe agreement initiated by appellants themselves and for which they expected some benefits does not, as they naively suggest, absolve their guilt. The idea of third-party funding was first hatched at one of the negotiating sessions by Steinberg,* and may show appellants to have had a sophisticated business acumen, but certainly does not show appellants were innocents ensnared into a crime they did not want to commit.

There can be entrapment as a matter of law only if the Government induced or created the offense, and if there is no evidence that the defendant was predisposed to commit the crime. *United States* v. *Russell*, 411 U.S. 423 (1973); *Sherman* v. *United States*, 356 U.S. 369 (1958); *United States* v. *Rosner*, 485 F.2d 1213, 1221-1222 (2d Cir. 1973), *cert. denied*, 417 U.S. 950. As this Court said in *Rosner*:

> "When the defendant sustains the burden of proving government inducement, the burden then is cast upon the Government to prove the defendant's predisposition to commit the crime beyond a reasonable doubt, but if predisposition is proved, the judgment of conviction will generally stand regardless of the Government's activity." 485 F.2d at 1221-1222.

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* "If we went to the people for money, too many people would know . . . that a federal agent was being paid off. . . . We're both guilty of the same crime. I'd give you money, I'm guilty of bribing a federal officer and you're the federal officer. . . . But if we turned you on to somebody straight. You and him, I'm not involved, that guy bought his green card. He's not going to open his mouth to anybody. You guys make a 1000 bucks a rap." (GX 2, GX 2A, p. 9; RA 338a).

As has been shown, the facts clearly establish that Steinberg and Riese created this crime; it was not induced by the Government. However, even if this Court were to conclude that there was inducement by the Government, Steinberg and Riese certainly were predisposed to corrupt the INS officers. The jury, acting on proper instructions, rejected the entrapment defense. Cf. *United States* v. *Rosner*, *supra*, 485 F.2d at 1222. As this Court said in *United States* v. *Koss*, 506 F.2d 1103, 1112 n.7 (2d Cir. 1974), *cert. denied*, 420 U.S. 977 (1975), "Entrapment, in any event, is a jury question."

Equally unavailing is the claim that appellants' Due Process rights have been abrogated, because this Court, following the Supreme Court's ruling in *United States* v. *Russell*, 411 U.S. 423 (1973), has held that once inducement has been shown, the focus shifts to the defendant, the only question being predisposition. Unless the Government agents violated the law or committed crimes, if predisposition is shown, the conviction will be affirmed.* *United States* v. *Rosner*, *supra*, 485 F.2d at 1221-1222.

Finally, even if Governmental misconduct could ever bar a prosecution, the actions of the officers in this case certainly would not warrant such a result. Volpe and Moskowitz showed a willingness to accept the defendants' offers only after repeated entreaties by Steinberg. It was Riese who first mentioned green cards, and it was Riese who suggested that the aliens bribe the agents for the

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* The Supreme Court has repeatedly rejected arguments that questionable conduct by Government agents will bar prosecution if predisposition is present. See *Hampton* v. *United States*, U.S. , 48 L.Ed.2d 113 (1976); *United States* v. *Russell*, 411 U.S. 423 (1973); *Hoffa* v. *United States*, 385 U.S. 293 (1966); *Sherman* v. *United States*, 356 U.S. 369 (1958).

cards. Riese's plan came only after the agents had warned the defendants of the risks they were running. The agents simply encountered repeated offers to pay them bribes, reported those offers to their superiors and then assisted in an investigation concerning the corrupt offers. Their actions were commendable, not outrageous or improper in any way.

Both appellants argue strenuously—but erroneously—that *Hampton* v. *United States*, U.S. , 48 L.Ed.2d 113 (1976), supports their position. In *Hampton*, the Court held that it was no defense to a charge of selling heroin that the Government had supplied the heroin to the defendant and then prosecuted him for selling the heroin to other Government agents. A majority of the Court concluded that entrapment was the only available defense and that the petitioner could not prevail on entrapment because he was predisposed to commit the offense. The Justices who wrote both the plurality and concurring opinions in *Hampton* said that the defendant's predisposition was dispositive. *Hampton*, therefore, rejects the argument raised by appellants here.

Nor do appellants find solace with the other authorities cited, as they have no relevance to this case. Cases relating solely to evidence seized from a defendant by force, threats or trickery,* or cases involving the exclusionary rule,** or, indeed, Justice Brandeis' famous *dictum* in *Olmstead* v. *United States*, 27 U.S. 438, 485 (1928), simply have nothing to do with the facts of this case.

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* *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Lynum* v. *Illinois*, 372 U.S. 528 (1963); *Spano* v. *New York*, 360 U.S. 315 (1959), discussed by Riese on page 32 of his brief.

** Pages 34-35 of Riese's brief.

Riese's reliance on *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973), is equally misplaced. *Archer* was decided on the narrow point that:

> "the Government did not provide sufficient proof of use or agreement to use interstate or foreign telephone facilities to satisfy the requirements of the so-called 'Travel Act', 18 U.S.C. § 1952." 486 F.2d at 672.

This Court was concerned in *Archer* with what it believed was an attempt by the Federal Government to intrude into the affairs of state government, and was disturbed because Government agents participating in the *Archer* investigation lied to a State Grand Jury, thereby deceiving the state criminal justice system. As this Court said in *United States* v. *Rosner*, *supra*, 485 F.2d at 1223:

> "We have held legitimate the activities of agents passing as corrupt, because bribery, like narcotics dealing, is hard to detect except by infiltration. . . ."

The *Rosner* Court then distinguished *Archer* by noting that Leuci, the Government agent in *Rosner*, had not broken the law or committed crimes. *Id.*

Here, unlike *Archer*, the immigration officers did not commit crimes, lie to a Grand Jury nor deceive the judicial system. The defendants' attempt to bribe Federal Immigration officers certainly was a proper matter for the Federal Courts, the Federal Bureau of Investigation and the United States Attorney.

Moreover, Riese errs in claiming that *Sherman* v. *United States*, 356 U.S. 369 (1968) is "virtually indistinguishable" from this case. In that case, the Gov-

ernment informer repeatedly asked the defendant Sherman for a source of narcotics. In this case, of course, the appellants repeatedly approached the Government agents—knowing that they were Government agents—and the appellants brought up the subjects of green cards, free meals and basketball and hockey games, and the scheme for aliens to buy green cards.

Lastly, Riese's claim that his right to privacy was invaded is supported by no relevant case, and is completely rejected in *Lopez* v. *United States*, 373 U.S. 427 (1963).

In *Lopez* the Supreme Court rejected the petitioner's claims that his privacy had been invaded and that he had been entrapped as a matter of law. Lopez ran an inn that was visited by Davis, an Internal Revenue agent who was investigating possible evasion of excise taxes in the area. After being told that the inn might have to pay a cabaret tax, Lopez took Davis to his office and said he wanted to avoid "aggravation" and reach an "agreement." Lopez first offered $200, then added another $220 which the agent took. Davis later returned, carrying concealed recording equipment. The Court rejected Lopez's entrapment claim, relying on the initial $420 offer Lopez made to Davis. The Court concluded that:

> "all that Davis was doing was to afford an opportunity for the continuation of a course of criminal conduct, upon which the petitioner had earlier voluntarily embarked, under circumstances susceptible of proof.
>
> "It is therefore evident that, under any theory, entrapment has not been shown as a matter of law." 373 U.S. at 436.

The Court also rejected as frivolous Lopez' claim that the tape recording of his conversation with Lopez violated his right to privacy. We submit that *Lopez* disposes of the claims Steinberg and Riese raise regarding both entrapment as a matter of law and invasion of their right of privacy.

In sum, the evidence overwhelmingly established that Steinberg and Riese initiated the scheme to bribe Volpe and Moskowitz and that they continued with that scheme even after they had been warned by Volpe, Moskowitz and Dolan about the risk they were running. Under the circumstances, this Court must reject the appellants' arguments that the conduct of the agents was outrageous and that the Government failed as a matter of law to prove the defendants' predisposition.

POINT II

The District Judge's instruction to the jury on entrapment was entirely correct.

In asking this Court to rule that Judge Wyatt's instruction on entrapment was improper, Steinberg does not even give this Court a hint as to the nature of the asserted deficiency. Steinberg raised no objection to the Court's entrapment instruction either when Judge Wyatt read it to counsel before summations were given or after the charge had been given. Steinberg's failure to object to the charge and his failure to tell this Court in what way the charge is deficient makes it unnecessary for this Court even to consider this issue. *United States* v. *Santiago*, 528 F.2d 1130 (2d Cir.), *cert. denied*, 44 U.S. L.W. 3659 (May 18, 1976); *United States* v. *Goldberg*, 525 F.2d 165 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3659 (May 18, 1976); *United States* v. *Pinto*, 503 F.2d 718, 723 (2d Cir. 1974); *United States*

v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966); *United States* v. *Kahaner*, 317 F.2d 459, 475 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963); Rule 30 Fed. R. Crim. P. Even if defense counsel below had excepted generally to the trial court's decision not to charge in the language counsel requested, counsel's failure to specify the basis for his exception would have been fatal on appeal, absent plain error. *United States* v. *Dixon*, 536 F.2d 1388, 1397 (2d Cir. 1976).

In any event, the court's charge on entrapment was entirely correct. Judge Wyatt explained the concept of entrapment in a lucid, straight-forward manner, telling the jury in essence that it should acquit if it concluded that a defendant committed the crime charged "only because he was induced or persuaded or talked into it so to speak, by some agent of the Government . . ." Indeed, Judge Wyatt's charge was more favorable to the defense than the charge approved by this Court in *United States* v. *Braver*, 450 F.2d 799 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972), where the District Court placed the burden of establishing inducement on the defendant.

Here, Judge Wyatt placed no burden of proof on the defendants. He stated:

> "Now, as to the burden of proof on the issue of entrapment, if you find that there is some evidence of inducement by a Government agent or agents of the illegal conduct, then the Government has the burden of proving beyond a reasonable doubt that such inducement did not cause or create the offense in that a defendant was ready and willing to commit the offense."

This instruction was a clear and correct statement of the law. *United States* v. *Rosner*, 485 F.2d 1213,

1221-1222 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States* v. *Braver*, 450 F.2d 799, 801-805 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972); *United States* v. *Berger*, 433 F.2d 680, 684 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971).

POINT III

The prosecutor's summation, which was based on the record, was in all respects proper.

Both appellants claim that the prosecutor's summation was improper in several respects. Since each of the asserted improprieties was based upon facts in the record, and reasonable inferences derived therefrom, this contention is frivolous. As this Court said in *United States* v. *Wilner*, 523 F.2d 68, 74 (2d Cir. 1975).

> "A prosecuting attorney is not an automaton whose role on summation is limited to parroting facts already before the jury. He is an advocate who is expected to prosecute diligently and vigorously, albeit without appeal to prejudice or passion. His task is not rendered easy by the 'no holds barred' tactics indulged in by all too many defense counsel in recent years."

First, Riese claims that the prosecutor improperly argued that appellants were motivated to bribe INS to maintain alien employment because aliens were willing to work for lower pay than native Americans. In making this argument, however, the prosecutor read directly from the transcript of the May 6 meeting:

> "Moskowitz: Well, who wants to work for $1.75 or whatever it is.
>
> "Steinberg: And right, the tips are like $15 at lunch time. Somebody from a foreign country,

> where their currency is worth less, they are making a lot of money, but for an American, you can't live on $60 a week." (GX 1A, p. 25, RA 288a).

It was entirely proper for the prosecutor to read from one of the Government exhibits, and then comment that Steinberg's statement during the tape recorded conversation:

> "is one of the keys to the case; Mr. Steinberg explained to Moskowitz they have to hire these illegal aliens because it's inexpensive labor. They're the only ones who are willing to work for this amount of money." (Tr. 1073-1074, RA 128a-129a).*

Next, Steinberg claims that there was no basis for the prosecutor's argument that Steinberg knew Dolan

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* This entirely proper conduct must be contrasted with the misleading statements Riese's own counsel made to the jury in his summation when he described the defendants as a "couple of kids who up to this moment are virgins, honest, unspoiled, never done anything wrong in their lives." After the Government objected to this argument, counsel said that there was no proof that either of the defendants "have been charged with a felony or have been arrested." He then said:

> "I tell you, ladies and gentlemen of the jury, that there is not the faintest vestige of proof that either of these defendants has ever had any kind of concern with the enforcement of the law in his life." (Tr. 1206-1207).

These statements were made in spite of the fact that since neither defendant had testified there was no basis in the record for the statements. Moreover, the statements were not true because Riese in fact had been arrested on a prior occasion. The arrest, on a marijuana charge, resulted in youthful offender treatment. (Sentencing Minutes, May 21, 1976, pp. 2-3, 8.) The Government does not suggest that the charge against Riese was significant, only that his counsel's statement was false.

had warned Riese to have nothing to do with the INS officers. This argument, however, again was based on an inference supported by the record. On May 14th, four days after Riese's meeting with Dolan, Steinberg told Volpe and Moskowitz that "we" have discussed "this" with "different people" because this "is a little bit big for us." Steinberg then described what he called the "company's points of view." (GX 2, GX 2A, p. 4; RA 333a).* Since Steinberg told Volpe and Moskowitz that unnamed company superiors had told Steinberg and Riese that the company would not provide money for the INS officers, the prosecutor's statement that Steinberg knew what Dolan had said to Riese was based on the record.

Steinberg complains because the prosecutor said that Steinberg asked Volpe for "the special form for his girl friend, the marriage form." There is no basis for this complaint since the prosecutor was simply reading from a transcript of Government Exhibit 7 where Steinberg is quoted as saying "And a special form for my girl-friend." (GX 7A, p. 4). (Tr. 113-114, RA 168a-169a).

Steinberg's complaint that the prosecutor commented on his failure to testify by arguing that Steinberg on *May 6th* did not deny his earlier boasts that the Lindsay Administration and Police Department had been bought is totally misleading. The prosecutor was clearly referring to the fact that during the May 6th meeting, Volpe referred to Steinberg's earlier claim that he paid off the Police Department and the Lindsay Administration and the fact that Steinberg then did not deny previously making that statement. The prosecutor in no way commented on Steinberg's failure to testify at trial.

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* A few moments later Steinberg specifically referred to Dolan. (GX 2, GX 2A, p. 7; RA 336a).

Lastly, Steinberg claims that in his rebuttal summation, the prosecutor improperly repeated arguments made during his opening summation. Steinberg does not even claim that he was prejudiced by this, and, obviously, as long as the argument was based on the record, the question of whether it was repetitive must be left to the discretion of the trial court.* In any event, the rebuttal was perfectly proper. In this case entrapment was the only contested issue at the time of summations. In arguing that the defendants were not entrapped, the prosecutor read statements from transcripts of conversations the defendants had with the INS officers. After defense counsel argued to the jury that the Government had acted improperly and that the defendants had been entrapped, the prosecutor referred again to some of the statements he had read earlier, in order to demonstrate both that there was no entrapment and that the defendants were predisposed to corruption.

POINT IV

The trial court acted within its discretion in admitting tape recordings of conversations between the defendants and the INS officers.

Steinberg claims that the District Court committed reversible error by admitting into evidence tape recordings of meetings and telephone conversations that he and Riese had with Volpe and Moskowitz because the Government failed to prove the chain of custody of the tape

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* The extremely limited nature of any repetition is demonstrated by the fact that the Government's opening summation took seventy pages of the trial transcript (Tr. 1055-1125), while the Government's rebuttal was only fifteen pages. (Tr. 1216-1231).

recordings. This argument, as Steinberg's brief itself implies, simply is not supported by the law.

The admissibility of tape recordings, as with other evidence, is within the sound discretion of the trial court. *United States* v. *Bryant*, 480 F.2d 785, 790 (2d Cir. 1973). In *Lopez* v. *United States*, 373 U.S. 427, 440 (1963), the Supreme Court held that the trial court properly had admitted into evidence tape recordings of conversations in which the petitioner had offered bribes to an Internal Revenue Agent and noted that the trial "court's inherent power to refuse to receive material evidence is a power that must be sparingly exercised." The Court explained further:

> "The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court." *Id.*

Introduction of the tape recordings in this case violated no statute, rule of procedure or judicial decision.* The tape recordings were made in each instance with the consent of one of the parties to the conversation—either

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* Steinberg's claim that the requirements of 18 U.S.C. §§ 2510-2520 for court authorized wiretaps should be extended to consensual recordings is rejected by 18 U.S.C. § 2511(2)(c), which excepts from the warrant requirement recordings made by a party to the communication or where one of the parties to the communication has consented to the recording. *United States* v. *Bonanno*, 487 F.2d 654, 658 (2d Cir. 1973).

Volpe or Moskowitz. (Tr. 154). Volpe, who participated in each conversation of which a tape recording was introduced into evidence, first testified about the conversation to establish that he had a recollection of that conversation. Volpe then identified the tape recording, testified that he had listened to it and testified that the exhibit was an accurate recording of the conversation. This was a sufficient predicate for the trial court to admit the tape recording into evidence. *United States* v. *Knohl*, 379 F.2d 427, 440 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967).

When a party to a conversation has consented to have the conversation recorded,* the recording is admissible if there is evidence that the tape recording was accurate. As with other physical evidence, authenticity may be established by any credible proof, and "there is no hard and fast rule that the prosecution must exclude all possibility that the article may have been tampered with." *United States* v. *S. B. Penick & Co.*, 136 F.2d 413, 415 (2d Cir. 1943). The Government need only show by a preponderance of the evidence that as a matter of reasonable probability the evidence offered has not been misidentified or adulterated. Since this light burden, see Rule 901(a), F.R.Evid., was met in this case, the trial court was well within its discretion in admitting the highly probative recordings.**

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* See *Hoffa* v. *United States*, 385 U.S. 293, 300-303 (1966); *United States* v. *Wilner*, 523 F.2d 68, 74 (2d Cir. 1975).

** Neither appellant has ever suggested that the tapes are in any way inaccurate recordings of the conversations they represent. *Cf. United States* v. *Kaufer*, 387 F.2d 17, 19 (2d Cir. 1967).

POINT V

The trial court's questioning of the prospective jurors was more than adequate.

Steinberg complains that the trial court omitted four areas of inquiry in its *voir dire* of the jury, claiming the court failed to ask the prospective jurors (1) their residence address; (2) the employment of the jurors' children; (3) whether they had any bias regarding the use of tape recordings; (4) whether they had any bias regarding the use of undercover agents. This contention is patently without merit. Judge Wyatt acted well within the broad discretion accorded the trial court in conducting the *voir dire*. See *United States* v. *Reed*, 526 F.2d 740, 741-742 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 1431 (March 8, 1976); *United States* v. *Zane*, 495 F.2d 683, 693 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974); *United States* v. *Gillette*, 383 F.2d 843, 849 (2d Cir. 1967); Rule 24(a), Fed.R.Crim.P.

In any event, the record demonstrates that each of the four areas *was* covered during the *voir dire*. The jurors' home addresses appeared on the cards circulated to counsel during the exercise of the peremptory challenges. As to the employment of the jurors' children, Judge Wyatt told the jury panel that the "questions asked of you are intended to include members of your immediate family," and then the Judge gave an example in which he specifically referred to employment. (Transcript of the *Voir Dire*, March 22, 1976, p. 6, Steinberg Appendix p. A14). Judge Wyatt also asked specific questions about bias concerning tape recordings and undercover agents:

> "Now, the evidence in this case will include conversations which were lawfully recorded on tape because one of the parties to the conversation consented or did the recording.

"Would this circumstance affect your ability to be fair jurors?

"The evidence will also show that the Government used undercover officers in its investigations. Would this circumstance affect your ability to be fair jurors?" (Transcript of the *Voir Dire*, March 22, 1976, pp. 15-16; Steinberg Appendix, pp. A23-A24).

The cases on which Steinberg relies are as misleading as his recitation of the facts. *United States* v. *Bear Runner*, 502 F.2d 908 (8th Cir. 1974) and *Marson* v. *United States*, 203 F.2d 904 (6th Cir. 1953) involved unusual problems not present in this case. In *Bear Runner*, which was tried close in time and place to the Wounded Knee uprising, the conviction of the defendant—an Indian—was reversed because the trial court's general question about bias was inadequate. The defendant's conviction was reversed in *Marson* because the trial court refused to ask the jurors whether they had read a newspaper article, unfavorable to the defendant, that had appeared shortly before the trial. In sum, Steinberg has not even suggested any possible prejudice to the defendants as a result of the *voir dire*, and has failed to show any error.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

LAWRENCE IASON, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 15th day of October, 1976, he served a copy of the within brief by placing the same in properly postpaid franked envelopes addressed:

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And deponent further says that he sealed the said envelopes and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Lawrence Iason
LAWRENCE IASON

Sworn to before me this
15th day of October, 1976

Maria A. Israelian

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Qualified in New York County
Term Expires March 30, 1978